Supreme Court, U.S.
FILED

10-4 JUN 21 2010

No. OFFICE OF THE CLERK

In The Supreme Court of The United States

GARY HOFFMAN,

Petitioner,

v.

SANDIA RESORT AND CASINO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the doctrine of tribal immunity properly bars claims that an Indian Casino cheated a non-Indian gambler by refusing to pay a slot machine jackpot?

2. Whether the "property damage" under the waiver of immunity in Section 8 of the Tribal Gaming Compact applies only to *physical* damage to property?

CORPORATE DISCLOSURE STATEMENT

Plaintiff is not a corporation. There is no parent corporation or publicly held company owning 10% or more of the corporation's stock.

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Matthew L.M. Fletcher, Bringing Balance to Indian Gaming, 44 Harvard Journal on Legislation 39 (2007) 14, 15

Note: McLish, Tribal Sovereign Immunity: Searching for Sensible Limits, 88 Colum. L. Rev. 173 (January, 1988). . . . 17

Steven Andrew Light and Kathryn R.L Rand, Indian Gaming and Tribal Sovereignty: The Casino Compromise (Univ. Press of Kansas, 2005) 15, 16

OPINIONS AND ORDERS BELOW

The decision of the New Mexico Second Judicial District Court granting the defendant's motion to dismiss is included at page A-18 of the Appendix. The Order of the New Mexico Court of Appeals, 2010 NMCA 34, affirming the district court's dismissal is not reported and is included at pages A-2 to A-17 of the Appendix.

STATEMENT OF JURISDICTION

The decision of the New Mexico Court of Appeals, 2010 NMCA 34; 2010 N.M. App. LEXIS 47, was issued on January 26, 2010. Petitioner applied for discretionary review by the New Mexico Supreme Court and on March 23, 2010, the Court denied Petitioner's Petition for Certiorari. Ninety days after March 23, 2010, is June 21, 2010.

This Petition is filed on June 21, 2010, and the Court has jurisdiction under Supreme Court Rule 13(1), which provides for filing a Petition for Certiorari within 90 days of entry of the Order denying discretionary review.

RELEVANT LEGAL PROVISIONS

There are two legal provisions involved in this case:

1. The Indian Gaming Regulations Act

2. The State-Tribal Gaming Compact

The relevant portions of each are set out in the Appendix.

STATEMENT OF THE CASE

The facts are set out in the decision of the Court of Appeals:

> On August 16, 2006, Hoffman was a visitor at Sandia and began playing the Mystical Mermaid slot machine. At some point during play, the machine indicated that Hoffman had won $1,597,244.10. Sandia did not pay any prize money to Hoffman because, according to Sandia, the machine had malfunctioned and the malfunction voided all play on the machine. Hoffman followed the regulations of the Sandia Gaming Commission and appealed Sandia's determination regarding non-payment. The Commission affirmed Sandia's decision that Hoffman was not entitled to any of the award

indicated on the machine.

Hoffman v. Sandia, 2010 NMCA 34, at p. 1.

The issues of tribal immunity and waiver were necessarily addressed in Plaintiff's response to Sandia Casino's Motion to Dismiss. Following dismissal on the grounds of tribal immunity and absence of physical property damage, Petitioner appealed the dismissal to the New Mexico Court of Appeals, where the same issues of immunity and waiver were presented. Finally, Petitioner sought review in a Petition to the New Mexico Supreme Court. The Court denied discretionary review, and Petitioner now presents this Petition to the United States Supreme Court.

ARGUMENT

Despite indications that the broad application of tribal immunity to dismiss claims arising from Indian casinos is nearing an end, the New Mexico Court of Appeals "readily dismiss(ed) Hoffman's argument that we should abandon sovereign immunity as a legal principle." *Hoffman v. Sandia*, 2010 NMCA 34, at p. 3. To the contrary, Petitioner does not urge the Court to "abandon sovereign immunity as a legal principle."

Rather, he suggests the impropriety of using tribal immunity as a shield for misconduct and proposes a narrower and more equitable application of tribal immunity in the context of tribal gaming under the provisions of the Indian Gaming Regulatory Act.

Additionally, Petitioner contends that he has suffered "property damage" even though the damage is financial and therefore not within the definition of the New Mexico courts which require "physical" damage to his property in order to waive tribal immunity under the Gaming Compact.

A. Indian Casinos and Tribal Sovereignty

The United States Supreme Court has consistently characterized Indian tribes and pueblos as "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). They are considered "distinct, independent political communities, retaining their original natural rights" over their members and their land. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). And "(a)lthough Indian tribes enjoy sovereign authority over their members and territories, their immunity from suit in state court is not absolute." *Gallegos v. Pueblo of Tesuque*, 132 N.M. 207, 211; 46 P.3d 668, 672; 2002 NMSC 12.

A tribe can waive its own immunity. *Id.*; *Santa Clara Pueblo*, 436 U.S. at 58. In *Gallegos*, where no compact was in effect, the New Mexico Supreme Court was "not persuaded that the sole fact that Tesuque was operating a casino is reason enough to set aside the basic canons of tribal sovereignty." *Gallegos*, at 132 N.M. at 217; 46 P.3d at 679. Here, on the other hand, there are sound reasons to limit the application of tribal immunity and honor the express language of the

Gaming Compact so as to allow access to the courts to adjudicate disputes directly related to misconduct in the operation of the gaming enterprise.

It is certainly true that the courts "recognize tribal sovereign immunity as a legitimate legal doctrine of significant historical pedigree." *Id.*, citing *Puyallup Tribe, Inc. v. Dept. of Game and Fish*, 433 U.S. 165, 172 (1977). Regardless of its "historical pedigree," however, the broad application of the doctrine of tribal immunity is in many ways an inappropriate anachronism in a time when tribal enterprises produce billion-dollar casino revenues and Las Vegas style gambling casinos and resort hotels.

The original purpose of extending immunity to Indian tribes was to protect disadvantaged Indian nations and their governments and to advance self-determination, not to provide the ability to cheat non-Indians out of their gambling proceeds and deny them access to any court or other judicial process. It is indeed anomalous that the policy considerations that justified tribal immunity in the first place can now be applied to justify and permit such conduct as that demonstrated by the Casino's unsupported claim of "machine malfunction" in this case.

Examining "tribal gaming and sovereignty at their intersection," an ethnographer who studied the Seminole Indians in Florida observes that:

> Casinos bring into relief the double binds that characterize tribal sovereignty and,

> more broadly, the politics of indigeneity in the United States and other settler states. For example, casino rights are based in tribal sovereignty, but once Indians exercise their political autonomy in order to gain economic self-reliance, they immediately must fend off attacks on their political sovereignty . . . "Herein lies the paradox: federal and state-sanctioned Indian gaming creates situations in which Indian communities must compromise some of their legal sovereignty in order to maintain economic independence."

Jessica R. Cattelino, *Tribal Gaming and Indigenous Sovereignty*, 46 American Studies, 187, 195, 196 (Fall-Winter, 2005), quoting David Kamper, *Indian Gaming: Who Wins?* UCLA American Indian Studies Center.

A number of recent cases have addressed similar concerns. In *Puyallup Tribe,* 433 U.S. at 179, for example, Justice Blackmun wrote a separate concurring opinion, expressing "doubts . . . about the continuing vitality in this day of the doctrine of tribal immunity." Justice Blackmun then stated that he was "of the view that doctrine may well merit re-examination in an appropriate case." Justice Stevens later deemed the doctrine of sovereign immunity to be "founded upon an anachronistic fiction." *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991).

In *Nevada v. Hicks*, 533 U.S. 353 (2001) the U.S. Supreme Court addressed the extent of tribal civil jurisdiction over non-Indians engaged in activities within a reservation. The Court held that a tribal court lacked jurisdiction over a civil lawsuit against several Nevada state game wardens brought by a tribal member who claimed the wardens had violated his rights while searching his reservation home. The Court noted that "there is no effective review mechanism in place" over tribal court decisions. *Id.*, at 385 (Souter, J., joined by Kennedy & Thomas, JJ., concurring). Holding that tribal "self government" was not implicated, Justice Scalia held that state enforcement of state law within Indian tribal boundaries "no more impairs the tribe's self government than federal enforcement of federal law impairs state government." *Id.*, at 364.

Demonstrating the ambiguity that currently pervades the issues of Indian sovereignty and immunity, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 760 (1998), the Court affirmed the sovereignty and immunity of a tribe that defaulted on a construction contract, holding that Indian tribes "enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."

At the same time, the Court observed that "there are reasons to doubt the wisdom of perpetuating the doctrine" of Indian sovereign immunity:

> At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

Kiowa Tribe, 523 U.S. at 758.

Accordingly, "[t]hese considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule." *Id.* Justice Stevens found the tribal immunity doctrine "strikingly anomalous." "Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations?" he asked. "Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct." *Kiowa Tribe*, at 765-766, J. Stevens, dissenting.

If the Court in *Kiowa Tribe* raised doubts about any absolute or unwavering commitment to Indian

sovereignty and immunity, the U. S. Court of Appeals for the District of Columbia Circuit signaled a change in the courts' approach to Indian sovereignty in the context of casino gaming. In *San Manuel Indian Bingo and Casino v. NLRB,* 475 F.3d 1306 (D.C. Cir. 2007), first the National Labor Relations Board and then the D. C. Circuit Court of Appeals, approved NLRB jurisdiction over the employees of one of the largest Indian casinos in California.

The D.C. appellate court addressed tribal sovereignty, finding it at its strongest "when a tribal government acts . . . in a matter of concern only to members of the tribe." The Court went on to state that "[c]onversely, when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transactions with non-Indians, its claim of sovereignty is at its weakest." *San Manuel*, at 1312-1313.

> The principle of tribal sovereignty in American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regards internal affairs, thereby giving them latitude to maintain traditional customs and practices. But tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint.

San Manuel, at 1314. Affirming the jurisdiction of the NLRB, the court pointed out that "operation of a casino

is not a traditional attribute of self-government. Rather, the casino at issue here is virtually identical to scores of purely commercial casinos across the country." Also, "the vast majority of the Casino's employees and customers are not members of the Tribe, and they live off the reservation." Thus, the Tribe "is not simply engaged in internal governance of its territory and members, and its sovereignty over such matters is not called into question." *San Manuel*, at 1315.

Here, the rapid growth of Indian gaming facilities and revenues and the contentious national debate over Indian gaming laws and Indian franchises, sovereignty, privileges, and immunities all lend additional weight to the important legal, political, social, cultural, and moral issues at stake in this case. Because of the great public interest and the eroding state of tribal immunity in the casino context it would be highly beneficial for this Court to review and determine whether a broad application of tribal immunity should continue to deny access to the courts and effective adjudication to those with legitimate claims that they have suffered substantial damages at an Indian casino.

B. Waiver of Immunity for Property Damage

For Indian tribes with gaming establishments, Congress has already required a limited abrogation of sovereign immunity, premising all Class III Indian casino gambling on an agreement between the State and Indian tribes. Indian Gaming Regulatory Act, 25

U.S.C. Sec. 2701-2721. The Act was enacted in 1988, in part "to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. Sec. 2702. A-19.

Primary among the purposes and objectives of the Compact between the State and New Mexico gaming tribes and pueblos are:

> G. To address the State's interest in the establishment, by the Tribe, of rules and procedures for ensuring that Class III Gaming is conducted fairly and honestly by the owners, operators, employees and patrons of any Class III Gaming enterprise on Indian Lands.

A-22.

In this case, the Gaming Compact's Section 8, "Protection of Visitors," is the controlling provision, assuring that "the general civil laws of New Mexico and concurrent civil jurisdiction in the State courts and the Tribal courts shall apply to a visitor's claim of liability for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise ." A-23.

It is Petitioner's contention that his slot machine jackpot winnings were his property, and that Sandia Casino's refusal to pay him what it owed was "property damage" as defined in the Compact waiver provision.

Those who assert claims against the "Gaming Enterprise" are supposed to "have an effective remedy for obtaining fair and just compensation" for *any* claims of property damage, provided that those damages were "proximately caused by the conduct of the Gaming Enterprise." Section 8(D), A-24. When the Sandia Casino slot machine indicated that Mr. Hoffman had won jackpot and bonus jackpot rounds, he was entitled to consider that his "property."

Although the New Mexico courts have thus far defined "property damage" in the tribal gaming context as *physical* damage to property, this Court, in the context of casino fraud, may hold otherwise.

Relying on *R&R Deli, Inc. v. Santa Ana Star Casino*, 139 N.M. 85; 128 P.3d 513; 2006 NMCA 20, the District Court and Court of Appeals have held that Sandia's waiver of immunity relates only to *physical* injury to the body or property of its visitors.

However, nothing in *R&R Deli* or New Mexico law suggests or states a physical injury requirement. The Court of Appeals held that:

> [T]he Pueblo's sovereign immunity from suit will be waived in this case only if (1) Plaintiff is a "visitor" as that term is used in the gaming compact and (2) the gaming compact's use of the phrase "bodily injury and property damage" contemplates suits like the present one alleging

> breach of contract and tortious business activity.

R&R Deli, 139 N.M., at 90, 128 P.3d, at 518.

The other points relied upon by the Court in *R&R Deli* are similarly inapposite to Mr. Hoffman's claims in this case. Mr. Hoffman's status as a real "person," as opposed to a corporate "person," suggests that any injury he suffers *is* a "personal injury" and any damage to his property *is* "property damage" such that it falls under the intent of the Gaming Compact. Mr. Hoffman was indisputably a "visitor" to the Casino, well within the terms of the Compact, whereas R&R Deli was just as clearly *not* a "visitor." *R&R Deli*, at 91, 519 ("limiting the term 'visitor' to casino patrons and guests"). Mr. Hoffman's slot machine jackpot was money he personally won at the Casino, unlike the Deli Corporation's commercial lease or unrenewed liquor license.

The "safety and protection" of visitors to the Casino, at least arguably, includes personal and financial "protection" against being cheated by the Casino. The Compact expressly requires that gambling be "conducted fairly and honestly" and it requires that Casino customers suffering property damage "caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation." All of the relevant considerations of protection, property damage, honesty, and connection with the gaming enterprise apply to this case in which the

Casino arbitrarily claims a "machine malfunction" and refuses to pay a jackpot.

C. Reasons to Grant the Petition

With respect to both the application of the doctrine of tribal immunity in the context of Indian casinos and the interpretation of the Gaming Compact's waiver provisions, these are important issues of application of law, of substantial interest and importance to the public, which Petitioner respectfully asks the United States Supreme Court to review.

In Matthew L.M. Fletcher's *Bringing Balance to Indian Gaming*, 44 Harvard Journal on Legislation 39, 40 (2007), the "national backlash against Indian gaming" is described and discussed. While the focus of the article is on off-reservation gaming, Fletcher carefully explores the terrain, particularly addressing the regulation of tribal gaming enterprises by federal and state governments and outlines the steps Congress should take "to bring balance to the Indian Gaming Regulatory Act once again." *Id.*, at 44.

According to Fletcher, a frequent and leading commentator on Indian gaming issues, Congress intended that in Gaming Contracts "the tribe and the state would decide basic issues about the tribal gaming operations, such as which sovereign would handle the regulation of the facility . . ." *Id.*, at 52. The U.S. Congress stated that:

> A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system...

S. Rep. No. 100-446, at 13, cited in *Bringing Balance* at p. 56.

In the most recent and comprehensive work on the subject, the authors discuss the social and political considerations that affect gambling activities on Indian lands and the application of tribal sovereignty to such activities. Steven Andrew Light and Kathryn R. L. Rand, Indian Gaming and Tribal Sovereignty: The Casino Compromise (University Press of Kansas, 2005). In The Casino Compromise, Indian gaming is discussed as "a legal compromise" and as a political compromise. Light and Rand at pages 39 and 51, *et seq.*:

> As a relatively young and booming industry with defining shifts in law and policy . . . Indian gaming raises a myriad of political issues. These issues are complicated by the fact of tribal sovereignty and ongoing relationships between tribes and non-Native political institutions, as well as the general public's perception of Native Americans and tribal governments. Indian gaming, perhaps more than any other issue facing tribes today, has cap-

> tured the attention of policymakers and the public across the country. Issues surrounding tribal gaming, especially casino-style gaming, arise and develop on a daily basis, making both local and national headlines.

Light and Rand, at p. 59.

Light and Rand acknowledge that "Indian gaming is a magnet for criticism." They identify five "anti- Indian gaming themes that are pervasive in discussions of tribal gaming." Among them are the contentions that "Tribal governments cannot be trusted" and that "Tribal sovereignty is simply an unfair advantage." Light and Rand, at pages 122, 125, 131.

> A more serious accusation is that tribal governments are corrupt or corruptible, as manifested in a lack of casino oversight. . . . Time magazine's 2002 expose, for instance, acknowledged tribal regulation of Indian gaming, but added, "That's like Enron's auditors auditing themselves." As the fox guarding the henhouse, tribal governments are perceived as likely to misappropriate funds and bury evidence of wrongdoing.

Light and Rand, at p.129, quoting Bartlett and Steele, "Playing the Political Slots," Time, December 23, 2002.

A recent law review article discusses some of the inequitable aspects of tribal immunity and the IGRA, suggesting a limited abrogation of tribal immunity to grant jurisdiction over lawsuits by casino employees and patrons:

> . . . where no viable tribal forum is available to hear such claims:
>
> Such a limited abrogation would properly balance tribal and individual interests. First, a tribe's interest in maintaining its sovereign immunity is arguably near its nadir in these suits. Because gaming operations constitute commercial activities and do not directly touch on core tribal sovereignty concerns such as self-governance and tribal customs, the justification for tribal immunity. . . is diminished. Indeed, at least one commentator has argued that the Court in Kiowa Tribe, although it ultimately upheld tribal immunity, suggested that such immunity might have to yield in some commercial settings.

Courtney J.A. DaCosta: *When 'Turnabout' Is Not 'Fair Play': Tribal Immunity Under the Indian Gaming Regulatory Act*, 97 The Georgetown Law Journal 515, 552, 553 (2009); Also, see, Note: *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum. L. Rev. 173 (Jan. 1988) ("The current breadth with which the doctrine of tribal immunity is applied is

inconsistent with the policies that underlie it, and inappropriately denies plaintiffs the ability to seek redress in courts of law.")

The factual issues surrounding the declaration that there was a "machine malfunction" barring payment of Gary Hoffman's apparent winnings is similar in nature to other forms of actual and potential corruption, fraud, and dishonesty in casino operations and management. The assertion of immunity as a bar to determination of the facts is hardly commendable or conducive to trust or integrity, and may be seen at worst as an effort to cover up greed, deceit, and corruption.

Times have changed, and issues such as control of hunting, fishing, and farming on Indian lands have yielded to concerns over taxation of cigarette sales, exploitation of natural resources, and control and management of a multi-billion dollar Indian gaming industry. The rapid growth of Indian gaming facilities and revenues, the tremendous amount of money at issue, and the contentious national debate over Indian gaming laws and tribal immunity all lend additional weight to the legal, political, cultural, and financial issues at stake.

CONCLUSION

For all the foregoing reasons, the Court is respectfully requested to grant Gary Hoffman's Petition for Certiorari and review the issues of immunity and waiver presented in this case.

Respectfully submitted,

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Hoffman v. Sandia Resort

NO. 32,245

SUPREME COURT OF NEW MEXICO

2010 N.M. LEXIS 94

March 23, 2010, Decided

OPINION

PETITION FOR WRIT OF CERTIORARI DENIED.

GARY HOFFMAN,

Plaintiff-Appellant

v.

SANDIA RESORT AND CASINO,

Defendant-Appellee.

Docket No. 28,444

COURT OF APPEALS OF NEW MEXICO

2010 NMCA 34; 2010 N.M. App. LEXIS 47

January 26, 2010, Filed

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JUDGES: CELIA FOY CASTILLO, Judge. WE CONCUR: RODERICK T. KENNEDY, Judge, MICHAEL E. VIGIL, Judge.

OPINION BY: CELIA FOY CASTILLO

OPINION

CASTILLO, Judge.

[*1] This case presents us with another question regarding the extent of tribal sovereign immunity. Appellant Hoffman brought **[**2]** suit in district court based on his claims that Sandia Resort and Casino (Sandia) wrongfully refused to pay him a gambling prize. Holding that tribal sovereign immunity applies, we affirm the district court's

grant of Sandia's motion to dismiss based on lack of subject matter jurisdiction.

BACKGROUND

[*2] On August 16, 2006, Hoffman was a visitor at Sandia and began playing the Mystical Mermaid slot machine. At some point during play, the machine indicated that Hoffman had won $ 1,597,244.10. Sandia did not pay any prize money to Hoffman because, according to Sandia, the machine had malfunctioned and the malfunction voided all play on the machine. Hoffman followed the regulations of the Sandia Gaming Commission and appealed Sandia's determination regarding non-payment. The Commission affirmed Sandia's decision that Hoffman was not entitled to any of the award indicated on the machine.

[*3] Having exhausted his tribal remedies, Hoffman then filed a complaint in the Second Judicial District Court alleging breach of contract, prima facie tort, and violation of the Unfair Practices Act. Sandia filed a motion to dismiss claiming that because the casino was a wholly-owned, operated, and unincorporated **[**3]** enterprise of the Pueblo of Sandia, sovereign immunity barred Hoffman's suit. Hoffman countered by arguing first that there were disputed facts regarding Sandia's relationship to Sandia Pueblo (the Pueblo) and the malfunction of the machine. Hoffman also argued that the Tribal-State Class III Gaming Compact (Compact), *NMSA 1978, §§ 11-13-1 to -2* (1997), entered into between the State of New Mexico and Sandia waived Sandia's

sovereign immunity with respect to his claims. The district court rejected Hoffman's arguments, decided that tribal sovereign immunity applied, and granted Sandia's motion to dismiss. This appeal followed.

DISCUSSION

[*4] Hoffman's primary argument on appeal is that the waiver of immunity and choice of law provisions in Sections 8(A) and 8(D) of the Compact establish that Sandia waived sovereign immunity with respect to his claims for breach of contract, prima facie tort, and violation of the Unfair Practices Act. As a preliminary matter, however, Hoffman contends that factual disputes preclude dismissal. And in his last argument, Hoffman asserts that sovereign immunity is an anachronistic legal theory and asks us to abandon it and its application in his case. We address **[**4]** these arguments in reverse order.

A. Abandonment of Sovereign Immunity as a Legal Principle

[*5] We may readily dismiss Hoffman's argument that we should abandon sovereign immunity as a legal principle. We have no authority to decline to follow precedent established by our superior courts. *See Alexander v. Delgado, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973)* ("[A] court lower in rank than the court which made the decision invoked as a precedent cannot deviate therefrom and decide contrary to that precedent[.]" (internal quotation marks and citation omitted)).

[*6] Both the United States Supreme Court and the New Mexico Supreme Court recognize tribal sovereign immunity as a legitimate legal doctrine of significant historical pedigree. *See Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 172, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977)* (stating that "it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe"); *Gallegos v. Pueblo of Tesuque, 2002 NMSC 12, P 7, 132 N.M. 207, 46 P.3d 668* ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." (internal quotation marks and citations omitted)). Accordingly, we will proceed [**5] with Hoffman's remaining argument.

B. Factual Disputes

[*7] We now turn to Hoffman's preliminary argument. He claims that there is a question of fact regarding the relationships among Sandia Casino, Sandia Pueblo, and the Sandia Gaming Commission such that he should have been allowed to conduct discovery "concerning insurance coverage, corporate status and organization, or the facts concerning the occurrence, investigation, or results of any inquiry" about the non-payment of his winnings. We disagree.

[*8] This matter came before the district court on a motion to dismiss for failure to state a claim under Rule 1-012(B)(6) NMRA. In reviewing a motion to dismiss for failure to state a claim, we take the well-pleaded facts alleged in the complaint

as true and test the legal sufficiency of the claims. *Envtl. Control, Inc. v. City of Santa Fe, 2002 NMCA 3, P 6, 131 N.M. 450, 38 P.3d 891 (filed 2001).* In his complaint, Hoffman identified Sandia as a resort hotel and casino and made no allegations that Sandia was an entity separate from or unrelated to Sandia Pueblo.

[*9] The complaint does acknowledge that Hoffman went through Sandia's grievance and appeal process, thus admitting the connection between **[**6]** Sandia and its gaming commission. While there are allegations of non-payment, there are no allegations regarding an investigation or inquiry about the non-payment.

[*10] We have concerns about Hoffman's argument. Generally, the district court need not allow discovery before granting a Rule 1-012(B)(6) motion. *See Rio Grande Kennel Club v. City of Albuquerque, 2008 NMCA 93, P 10, 144 N.M. 636, 190 P.3d 1131* (concluding "that the district court was not required to allow [the p]laintiffs to develop the factual record in order to decide the motions to dismiss"). Here, Sandia, in its motion to dismiss, describes itself as "a wholly-owned and operated, unincorporated enterprise of the Pueblo of Sandia . . . , a federally-recognized Indian tribe." Hoffman does not directly dispute this status; rather, he complains that he should have been given the opportunity to propound discovery on this issue and on the issue of the malfunctioning gaming machine before dismissal. Oddly, however, at no time during the pendency of this suit did Hoffman attempt to file any

discovery requests about any issue in the case. Further, Hoffman provides no citation to authority for his argument here or below that discovery [**7] was required before dismissal. Issues raised in appellate briefs that are unsupported by cited authority will not be reviewed by us on appeal. *In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984)* ("We have long held that to present an issue on appeal for review, an appellant must submit argument and authority as required by rule." (Emphasis omitted.)).

C. Sovereign Immunity and Hoffman's Claims

[*11] Hoffman's argument is straight-forward. He maintains that his claims were properly brought in district court because the unpaid slot machine winnings constitute property damage, and Section 8 of the Compact waives sovereign immunity for property damage. New Mexico case law does not support Hoffman's position.

[*12] Whether Sandia has waived its sovereign immunity with respect to Hoffman's claims is a question we review de novo. *Holguin v. Tsay Corp., 2009 NMCA 56, P 9, 146 N.M. 346, 210 P.3d 243.* "It has long been recognized that Indian tribes have the same common-law immunity from suit as other sovereigns." *R & R Deli, Inc. v. Santa Ana Star Casino, 2006 NMCA 20, P 10, 139 N.M. 85, 128 P.3d 513 (filed 2005).* Tribal sovereign immunity precludes state courts from entertaining lawsuits [**8] against tribal entities. *Gallegos, 2002 NMSC 12, P 7, 132 N.M. 207, 46 P.3d 668.* Corporate

entities under tribal control are extended the same sovereign immunity as the tribe itself. *Sanchez v. Santa Ana Golf Club, Inc., 2005 NMCA 3, P 6, 136 N.M. 682, 104 P.3d 548 (filed 2004).* A tribe may waive its sovereign immunity, but such waivers must be "express and unequivocal." *R & R Deli, 2006 NMCA 20, P 10, 139 N.M. 85, 128 P.3d 513.* "Because a tribe need not waive immunity at all, it is free to prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted. Any such conditions or limitations must be strictly construed and applied." *Id.* (internal quotation marks and citations omitted).

[*13] As Sandia concedes, the Compact contains specific provisions which effect a limited and specific waiver of tribal sovereign immunity with respect to the Indian tribes in New Mexico engaged in gaming. The Compact was negotiated under the comprehensive scheme of the Indian Gaming Regulatory Act, *25 U.S.C. §§ 2701 through 2721 (2000),* a seminal federal statute which "established the framework under which Indian tribes and states could negotiate compacts permitting . . . gaming on Indian reservations located **[**9]** within state territory." *Doe v. Santa Clara Pueblo, 2007 NMSC 8, P 6, 141 N.M. 269, 154 P.3d 644* (internal quotation marks and citation omitted). Both the pueblos and the state were involved in negotiating the terms of the Compact under the Compact Negotiation Act. *Id.* "That negotiation process led to the various provisions of the Compact, including Section 8, with which we are concerned in this case." *Doe, 2007*

NMSC 8, P 6, 141 N.M. 269, 154 P.3d 644. As pointed out by the Amici, all of the Indian tribes engaged in gaming in the State of New Mexico operate under the same Compact. Amici in this case consists of the Pueblos of Isleta, Laguna, Nambe, Ohkay Owingeh, Pojoaque, and San Felipe; each Indian tribe is located in New Mexico and engaged in the enterprise of gaming and subject to the Compact.

[*14] Hoffman relies on language in Sections 8(A) and 8(D) of the Compact to establish that Sandia waived its sovereign immunity with respect to his claims.

[*15] Section 8(A) of the Compact provides, in pertinent part:

> The safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately **[**10]** caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation. To that end, in this Section, and subject to its terms, the Tribe . . . agrees to a limited waiver of its immunity from suit, and agrees to proceed either in binding arbitration proceedings or in a court of competent jurisdiction, at the visitor's election, with respect to claims for bodily injury or property damage proximately caused by

> the conduct of the Gaming Enterprise. For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land[.]

Id. (internal quotation marks and citation omitted); *see R & R Deli, 2006 NMCA 20, P 18, 139 N.M. 85, 128 P.3d 513.* Section 8(D) of the Compact states that the Pueblo "waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage up to the amount of fifty million dollars ($ 50,000,000) per occurrence asserted as provided in this section." *R & R Deli, 2006 NMCA 20, P 18, 139 N.M. 85, 128 P.3d 513.*

[*16] As a matter of convenience, we observe that subsections (A) and (D) both fall within Section 8 of the Compact and both provide a waiver with respect to claims for bodily **[**11]** injury or property damage. As such, they are plainly part of the same single waiver. Accordingly, we need not refer to the two provisions independently throughout our discussion. Rather, we will merely refer to them collectively as the waiver provision of Section 8.

[*17] Generally, "Section 8 addresses subject matter jurisdiction over personal injury claims against the Pueblos resulting from incidents occurring on Indian land in connection with Class III gaming." *Doe, 2007 NMSC 8, P 8, 141 N.M. 269, 154 P.3d 644.* Our Court has previously addressed the meaning of the Section 8 waiver language in *R & R*

Deli, 2006 NMCA 20, 139 N.M. 85, 128 P.3d 513, and *Holguin, 2009 NMCA 56, 146 N.M. 346, 210 P.3d 243*. *R & R Deli* dealt with a variety of contract and tort claims brought against tribal entities by a commercial lessee. *2006 NMCA 20, P 6, 139 N.M. 85, 128 P.3d 513*. In affirming the district court's dismissal of all claims based on sovereign immunity, we looked to the intent of the drafters and concluded that they "intended to provide a limited waiver of sovereign immunity for purposes of providing a remedy to casino patrons who suffer *physical injury* to their persons or property." *Id. P 24* (emphasis added). Although we did not define with specificity what constitutes a physical injury to a casino patron's **[**12]** person or property, we did reach two conclusions that provide guidance: (1) personal injury claims brought by casino patrons are one but not the only form of physical injury clearly contemplated by the Compact language, *R & R Deli, 2006 NMCA 20, PP 21-22, 24, 139 N.M. 85, 128 P.3d 513*; and (2) contract law and business tort claims are not claims for physical damage to property as contemplated by Section 8 of the Compact. *R & R Deli, 2006 NMCA 20, P 19, 139 N.M. 85, 128 P.3d 513*.

[*18] In our second case, the plaintiff in *Holguin* won a random drawing for a $ 250,000 prize at a New Mexico tribal gaming facility. *2009 NMCA 56, P 1, 146 N.M. 346, 210 P.3d 243*. He disagreed with the manner in which he would be allowed to collect on the prize so he brought suit in district court for breach of contract, conversion, unfair practices, and

for two counts of invasion of privacy. *Id.* On appeal, we held that sovereign immunity barred all claims. *See id. P 3.* We repeated our holding in *R & R Deli:* the words "bodily injury" and "property damage" in Section 8 of the Compact relate to the safety of visitors and mean--as the plain meaning of the words imply--"physical damage to . . . persons or property." *Holguin, 2009 NMCA 56, P 11, 146 N.M. 346, 210 P.3d 243.*

[*19] Hoffman argues that the "personal injury" requirement **[**13]** was wrongly decided in *R & R Deli* because the holding was based on interpreting Section 8 to apply to "bodily injury *and* property damage" instead of "bodily injury *or* property damage." (Emphasis added.) According to Hoffman, the misappropriation of "and" for "or" permitted us to draw the incorrect conclusion that the Compact was concerned only with physical injury to the persons or property of casino patrons. We disagree. Hoffman's argument is based on a far too circumscribed reading of our analysis in *R & R Deli.* Whether the words are connected by an "and" or an "or" is not determinative. Careful review of the analysis reveals that it was based on the use of the words "bodily injury" and "property damage" employed together consistently throughout Section 8 of the Compact. *R & R Deli, 2006 NMCA 20, P 21, 139 N.M. 85, 128 P.3d 513.* We relied on the close juxtaposition of these terms, not the conjunction between them. *Id.*

[*20] Hoffman also disputes the district's court's determination that he has no property damage.

According to Hoffman, when the Sandia slot machine indicated that he had won a jackpot and jackpot rounds totaling approximately 1.6 million, he was entitled to consider the unpaid winnings his "property." **[**14]** While he acknowledges his damage was not based on a direct physical injury to his body, he maintains that it constituted "damage" to his property. *See Kosiba v. Pueblo of San Juan, 2006 NMCA 57, 139 N.M. 533, 135 P.3d 234*; *Computer Corner, Inc. v. Fireman's Fund Ins. Co., 2002 NMCA 54, 132 N.M. 264, 46 P.3d 1264*; *see also Devlin v. United States, 352 F.3d 525 (2d Cir. 2003)*. Hoffman argues that New Mexico law does not require "a physical injury requirement" to his damage claim. Hoffman misreads the law as it relates to tribal sovereign immunity.

[*21] *Computer Corner, Inc.* concerned an insurance company's duty to indemnify an insured. *2002 NMCA 54, PP 1, 4, 132 N.M. 264, 46 P.3d 1264*. The term "property damage" appears in that opinion because the insurance contract in dispute excluded specific types of property damage as specifically defined in that contract. *Id. PP 14-19*. The case had nothing to do with the use of this term in the Compact. In *Kosiba,* the plaintiff alleged that the loss of his gaming license had been caused by improper governmental action of the Pueblo's gaming commission. *2006 NMCA 57, P 12, 139 N.M. 533, 135 P.3d 234*. We held that the plaintiff had no standing to assert the waiver of immunity contained in Section 8, because **[**15]** the waiver in Section 8 "is limited to victims of whose injuries are caused by

the conduct of the Gaming Enterprise." *Kosiba, 2006 NMCA 57, P 12, 139 N.M. 533, 135 P.3d 234.* We fail to see how this holding advances Hoffman's case. Lastly, in *Devlin,* the Second Circuit was required to interpret the term "injury of loss of property" under the Federal Tort Claims Act (FTCA). *Devlin, 352 F.3d at 529-30.* We do not see how interpretation of the language in the FTCA has any bearing on the interpretation of the waiver language in the Compact, especially in light of New Mexico law that sets out the meaning of property damage as contemplated by Section 8. *See R & R Deli, 2006 NMCA 20, P 19, 139 N.M. 85, 128 P.3d 513* (holding that neither breach of contract nor tort claims constitute property damage as contemplated by the Compact); *see also Holguin, 2009 NMCA 56, P 13, 146 N.M. 346, 210 P.3d 243* (holding that invasion of privacy claims and the alleged emotional injuries stemming from those claims do not constitute property damage as contemplated by the Compact). Rather, the Compact provides a limited waiver of sovereign immunity for physical damage to casino patrons or their property proximately caused by the gaming enterprise. *Holguin, 2009 NMCA 56, P 11, 146 N.M. 346, 210 P.3d 243; R & R Deli, 2006 NMCA 20, PP 21, 24, 139 N.M. 85, 128 P.3d 513.* **[**16]** The term physical injury or damage refers literally to the physical destruction or impairment of the tangible property of a casino patron. *See Holguin, 2009 NMCA 56, P 13, 146 N.M. 346, 210 P.3d 243* (observing that incorporeal claims do not constitute physical damage to property as contemplated by the Compact).

[*22] Hoffman cites to *Doe, 2007 NMSC 8, P 18, 141 N.M. 269, 154 P.3d 644*, and he argues that sovereign immunity does not apply in this case because Sandia's actions in refusing to pay Hoffman his winnings are inconsistent with "the effective *regulation* of Class III Gaming." Hoffman complains that there are no regulations, rules, or procedures to ensure that Sandia's gaming is conducted fairly and honestly. He also points to *Romero v. Pueblo of Sandia, 2003 NMCA 137, P 15, 134 N.M. 553, 80 P.3d 490*, as a case that stands for the proposition that one of the purposes of the Compact is to ensure that casino gaming is conducted fairly and honestly. We have difficulty understanding Hoffman's contentions, but he appears to be arguing that the Compact covers the regulation of Class III gaming, the Compact must ensure that gaming is conducted fairly and honestly, Sandia's non-payment of his jackpot is not fair or honest, and his only effective **[**17]** remedy is to be able to bring suit in district court. As we explained in paragraph six above, the doctrine of sovereign immunity applies to Indian tribes. Section 8 of the Compact provides a limited waiver of sovereign immunity for the claims of casino patrons that are based on physical injury to their persons or property. Hoffman's claims cannot be so classified. Sovereign immunity bars his claims.

CONCLUSION

[*23] Based on the foregoing, we affirm the ruling of the district court.

[*24] IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

MICHAEL E. VIGIL, Judge

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

GARY HOFFMAN,

Plaintiff,

vs. Cause No. D 202 CV 2007-07478

SANDIA RESORT AND CASINO

Defendant.

ORDER

THIS MATTER having come before the Court on Defendant Sandia Resort and Casino's Motion to Dismiss, and the Court having heard the arguments of the parties and being fully advised in the premises, states:

Defendant Sandia Resort and Casino's Motion is hereby GRANTED.

s/ Linda M. Vanzi

HONORABLE LINDA M. VANZI
District Court Judge

UNITED STATES CODE SERVICE

TITLE 25. INDIANS
CHAPTER 29. INDIAN GAMING REGULATION

25 USCS § 2702

§ 2702. Declaration of policy

The purpose of this Act is--

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

MICHIE'S ANNOTATED STATUTES OF NEW MEXICO

CHAPTER 11. INTERGOVERNMENTAL AGREEMENTS AND AUTHORITIES ARTICLE 13. INDIAN GAMING COMPACT

N.M. Stat. Ann. § 11-13-1 (2010)

§ 11-13-1. Indian gaming compact entered into

The Indian Gaming Compact is enacted into law and entered into with all Indian nations, tribes and pueblos in the state legally joining in it by enactment of a resolution pursuant to the requirements of applicable tribal and federal law. The compact is enacted and entered into in the form substantially as follows:

INDIAN GAMING COMPACT

INTRODUCTION

The State is a sovereign State of the United States of America, having been admitted to the Union pursuant to the Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310, and is authorized by its constitution to enter into contracts and agreements, including this Compact, with the Tribe;

The Tribe is a sovereign federally recognized Indian tribe and its governing body has authorized the officials of the Tribe to enter into contracts and agreements of every description, including this Compact, with the State;

The Congress of the United States has enacted the Indian Gaming Regulatory Act of 1988, *25 U.S.C. §§ 2701*-2721 (hereinafter "IGRA"), which permits Indian tribes to conduct Class III Gaming on Indian Lands pursuant to a tribal-state compact entered into for that purpose;

The Tribe owns or controls Indian Lands and by Ordinance has adopted rules and regulations governing Class III games played and related activities at any Gaming Facility;

The State and the Tribe, in recognition of the sovereign rights of each party and in a spirit of cooperation to promote the best interests of the citizens of the State and the members of the Tribe, have engaged in good faith negotiations recognizing and respecting the interests of each party and have agreed to this Compact.

NOW, THEREFORE, the State and the Tribe agree as follows:

TERMS AND CONDITIONS SECTION

SECTION 1. Purpose and Objectives.

The purpose and objectives of the State and the Tribe in making this Compact are as follows:

A. To evidence the good will and cooperative spirit between the State and the Tribe;

B. To continue the development of an effective government-to-government relationship between the State and the Tribe;

C. To provide for the regulation of Class III Gaming on Indian Lands as required by the IGRA;

D. To fulfill the purpose and intent of the IGRA by providing for tribal gaming as a means of generating tribal revenues, thereby promoting tribal economic development, tribal self-sufficiency, and strong tribal government;

E. To provide revenues to fund tribal government operations or programs, to provide for the general welfare of the tribal members and for other purposes allowed under the IGRA;

F. To provide for the effective regulation of Class III Gaming in which the Tribe shall have the sole proprietary interest and be the primary beneficiary; and

G. To address the State's interest in the establishment, by the Tribe, of rules and procedures for ensuring that Class III Gaming is conducted fairly and honestly by the owners, operators, employees and patrons of any Class III Gaming enterprise on Indian Lands.

. . .

SECTION 8. Protection of Visitors.

A. Liability to Visitors. The safety and protection of visitors to a Gaming Facility and uniformity and application of laws and jurisdiction of claims is directly related to and necessary for the regulation of Tribal gaming activities in this state. To that end, the general civil laws of New Mexico and concurrent civil jurisdiction in the State courts and the Tribal courts shall apply to a visitor's claim of liability for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise and:

1. occurring at a Gaming Facility, other premises, structures, on grounds or involving vehicles and mobile equipment used by a Gaming Enterprise;

2. arising out of a condition at the Gaming Facility or on premises or roads and passageways immediately adjoining it;

3. occurring outside of the Gaming Facility but arising from the activities of the Gaming Enterprise;

4. as a result of a written contract that directly relates to the ownership, maintenance or use of a Gaming Facility or when the liability of others is assumed by the Gaming Enterprise; or

5. on a road or other passageway on Indian lands while the visitor is traveling to or from the Gaming Facility.

B. Insurance Coverage for Claims Required. The Gaming Enterprise shall maintain in effect

policies of liability insurance insuring the Tribe, its agents and employees against claims, demands or liability for bodily injury and property damages by a visitor arising from an occurrence described in Subsection A of this section. The policies shall provide bodily injury and property damage coverage in an amount of a least one million dollars ($ 1,000,000) per person and ten million dollars ($ 10,000,000) per occurrence. The Tribe shall provide the State Gaming Representative annually a certificate of insurance showing that the Tribe, its agents and employees are insured to the required extent and in the circumstances described in this section.

C. Limitation on Time to Bring Claim. Claims brought pursuant to the provisions of this section must be commenced by filing an action in court or a demand for arbitration within three years of the date the claim accrues.

D. Specific Waiver of Immunity. The Tribe, by entering into this Compact and agreeing to the provisions of this section, waives its defense of sovereign immunity in connection with any claims for compensatory damages up to the amount of one million dollars ($ 1,000,000) per injured person and ten million dollars ($ 10,000,000) per occurrence asserted as provided in this section. This is a limited waiver and does not waive the tribe's immunity from suit for any other purpose. The Tribe shall ensure that a policy of insurance that it acquires to fulfill the requirements of this

section shall include a provision under which the insurer agrees not to assert the defense of sovereign immunity on behalf of the insured.

E. Election by Visitor. A visitor having a claim described in this section may pursue that claim in the State court of general jurisdiction for such claims or the Tribal court or, at the option of the visitor, may proceed to enforce the claim in binding arbitration. The visitor shall make a written election that is final and binding upon the visitor.

F. Arbitration. Arbitration shall be conducted pursuant to an election by a visitor as provided in Subsection E of this section as follows:

1. the visitor shall submit a written demand for arbitration to the Gaming Enterprise, by certified mail, return receipt requested;

2. the visitor and the Gaming Enterprise shall each designate an arbitrator within thirty (30) days of the date of receipt of the demand, and the two arbitrators shall select a third arbitrator;

3. the arbitration panel shall permit the parties to engage in reasonable discovery, and shall establish other procedures to ensure a full, fair and expeditious hearing on the claim; and

4. the award of the arbitration panel shall be final and binding.

G. Public Health and Safety. The Tribe shall establish for its Gaming Facility health, safety and construction standards that are at least as stringent as the current editions of the National

Electrical Code, the Uniform Building Code, the Uniform Mechanical Code, the Uniform Fire Code and the Uniform Plumbing Code, and any and all Gaming Facilities or additions thereto constructed by the Tribe hereafter shall be constructed and all facilities shall be maintained so as to comply with such standards. Inspections will be conducted with respect to these standards at least annually. If the State Gaming Representative requests sufficiently in advance of an annual inspection, the State Gaming Representative may be present during such inspection. The Tribe agrees to correct any deficiencies noted in such inspections within a time agreed upon between the State and Tribe. The Tribal Gaming Agency will provide copies of such inspection reports to the State Gaming Representative, if requested to do so in writing.

No. 10-4

IN THE

Supreme Court of the United States

GARY HOFFMAN,
Petitioner,

v.

SANDIA RESORT AND CASINO,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

BRIEF IN OPPOSITION OF SANDIA RESORT AND CASINO TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court below properly reject Petitioner's argument that the tribal immunity doctrine should be abandoned to permit claims against tribal gaming operations where this Court has uniformly upheld tribes' immunity from suit subject to the power of Congress "to dispense with . . . or to limit" that immunity, *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991), and where Congress has already enacted a limited waiver of tribal immunity in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(ii), that does not apply to this case?

2. Where the Tribal-State Class III Gaming Compact between the Pueblo of Sandia and the State of New Mexico, negotiated and approved pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C) and New Mexico state law, provides for a limited waiver of the Pueblo's immunity from suit for visitors' claims for "bodily injury or property damage" and allows the exercise of state court jurisdiction over such claims, Compact Sec. 8, was the court below correct in holding that—following uniform decisions of the state courts of New Mexico interpreting this provision—the waiver applies only to claims of physical injury to persons or property?

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IN THE

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BRIEF IN OPPOSITION OF SANDIA RESORT AND CASINO TO PETITION FOR A WRIT OF CERTIORARI

COMPACT PROVISIONS INVOLVED

SECTION 1. Purposes and Objectives.

The purpose and objectives of the State and the Tribe in making this Compact are as follows:

A. To evidence the good will and cooperative spirit between the State and the Tribe;

B. To continue the development of an effective government-to-government relationship between the State and the Tribe;

C. To provide for the regulation of Class III Gaming on Indian Lands as required by the IGRA;

D. To fulfill the purpose and intent of the IGRA by providing for tribal gaming as a means of generating tribal revenues, thereby promoting tribal economic development, tribal self-sufficiency, and strong tribal government;

E. To provide revenues to fund tribal government operations or programs, to provide for the general welfare of the tribal members and for other purposes allowed under the IGRA;

F. To provide for the effective regulation of Class III Gaming in which the Tribe shall have the sole proprietary interest and be the primary beneficiary; and

G. To address the State's interest in the establishment, by the Tribe, of rules and procedures for ensuring that Class III Gaming is conducted fairly and honestly by the owners, operators, employees and patrons of any Class III Gaming enterprise on Indian Lands.

H. To settle and resolve certain disputes that have arisen between the Tribe and the State under the provisions of the Predecessor Agreements.

SECTION 8. Protection of Visitors.

A. *Policy Concerning Protection of Visitors.* The safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation. To that end, in this Section, and subject to its terms, the Tribe agrees to carry insurance that covers

such injury or loss, agrees to a limited waiver of its immunity from suit, and agrees to proceed either in binding arbitration proceedings or in a court of competent jurisdiction, at the visitor's election, with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise. For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court.

* * *

D. *Specific Waiver of Immunity and Choice of Law.* The Tribe, by entering into this Compact and agreeing to the provisions of this section, waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage up to the amount of fifty million dollars ($50,000,000) per occurrence asserted as provided in this section. This is a limited waiver and does not waive the Tribe's immunity from suit for any other purpose. The Tribe shall ensure that a policy of insurance that it acquires to fulfill the requirements of this section shall include a provision under which the insurer agrees not to assert the defense of sovereign immunity on behalf of the insured, up to the limits of liability set forth in this Paragraph. The Tribe agrees that in any claim brought under the provisions of this Section, New Mexico law shall govern the substantive rights of the claimant, and shall be applied, as applicable, by the forum in which the claim is heard, except that the tribal court may but shall not be required to apply New Mexico law to a claim brought by a member of the Tribe.

INTRODUCTION

Petitioner offers no basis for this Court to review the decision of the Court of Appeals of the State of New Mexico, which rejected Petitioner's request that the court simply abandon the doctrine of tribal sovereign immunity, Pet. App. 5-6, and held that the waiver of tribal immunity for "bodily injury or property damage" claims found in Section 8 of the Tribal-State Class III Gaming Compact ("Compact") between the Pueblo of Sandia and the State of New Mexico did not apply to Petitioner's unpaid winnings claim because it did not involve physical damage to property. Pet. App. 8-16. While Petitioner asks this Court to grant review to determine whether to abrogate tribal immunity for damages claims arising from Indian gaming activities, this Court has uniformly held that "[s]uits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Congress has already enacted a limitation on tribes' immunity in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(7)(A)(ii), which section does not apply here.[1] The Court of Appeals was plainly correct in declining to abrogate tribal immunity beyond the congressionally-set limits of IGRA.

Congress in IGRA also authorized tribes and states to "enter . . . into a Tribal-State compact

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[1] Under 25 U.S.C. § 2710(d)(7)(A)(ii), states may bring suits "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any [compact]." This is obviously not such a case.

governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). Under IGRA, a compact may provide for "the application of the criminal and civil laws and regulations of the Indian tribe or the State" relating to gaming activities and "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." *Id.* § 2710(d)(3)(C). The Pueblo and State of New Mexico entered into such a compact waiving tribal immunity for "bodily injury or property damage" claims in state court, which the Court of Appeals held applies only to claims based on physical injury to persons or property, and was therefore inapplicable to Petitioner's claim. The Court of Appeals' ruling applied settled law of the State of New Mexico, and applies only to Tribal-State Gaming compacts in New Mexico. Petitioner's disagreement with that decision provides no basis for review by this Court.

STATEMENT OF THE CASE

The Pueblo of Sandia ("Pueblo"), a federally-recognized Indian tribe, conducts Class III gaming at the Sandia Resort and Casino ("Sandia Casino"), under the terms of a Tribal-State Class III Gaming Compact ("Compact"), entered into in accordance with IGRA.[2] The Compact waives tribal immunity "for bodily injury or property damage" claims of visitors to the Sandia Casino, Compact Sec. 8.A, 8.D, permits such claims to be heard in state court, *id.*

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[2] IGRA allows only Indian tribes to conduct Class III gaming, *see* 25 U.S.C. § 2710(d)(3), and requires a Tribal-State compact for the conduct of Class III gaming by an Indian tribe. 25 U.S.C. § 2710(d)(1)(C).

Sec. 8.A,[3] and provides for the application of state law to "govern the substantive rights of the claimant." *Id.* Sec. 8.D.

Petitioner's complaint alleged that he visited Sandia Casino on August 16, 2006, and played a "Mystical Mermaid" slot machine that at some point indicated he had won $1,597,244.10. Pet. App. 4. Sandia Casino did not pay any prize money to Petitioner, however, because it determined that the machine had malfunctioned, voiding all play on the machine. *Id.* Petitioner appealed that determination to the Sandia Gaming Commission, which affirmed that Petitioner was not entitled to any of the award indicated on the machine. *Id.* Petitioner then filed suit in state district court alleging breach of contract, prima facie tort, and violation of the state Unfair Practices Act. Sandia Casino moved to dismiss the complaint, asserting that because the casino was a wholly-owned enterprise of the Pueblo, sovereign immunity barred Petitioner's suit. The district court ruled that tribal sovereign immunity applied, and granted Sandia Casino's motion to dismiss. Pet. App. 4-5.

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[3] The Compact which was in effect at all times relevant to this case was entered into in 2001. Its relevant provisions are reproduced *supra*. at 1-3. These provisions were submitted to the state district court as Exhibit 1 to Plaintiff's Response to Defendant's Motion to Dismiss, and are contained in the Record Proper ("RP") before the state court of appeals. RP 46-50. Petitioner's Appendix does not include these provisions. Instead, Petitioner has reproduced provisions of the state statutes which set forth the terms of the 1997 Compact, Pet. App. 20-26, which was superceded by the 2001 Compact. *See R&R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, 139 N.M. 85, 89-90, 128 P.3d 513, 517 (2005).

The Court of Appeals of New Mexico affirmed the state district court's decision unanimously. The court "readily dismiss[ed]" Petitioner's "argument that we should abandon sovereign immunity as a legal principle," Pet. App. 5-6 (citing *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977); *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 7, 132 N.M. 207, 46 P.3d 668 (2002)), and then rejected Petitioner's argument that he should have been allowed to conduct discovery concerning the tribal entity status of Sandia Casino, and the malfunctioning of the machine. Pet. App. 6-8. The Court found that Petitioner had never attempted to file discovery on any issue in the case, and that his argument that he should have been allowed to conduct discovery was unsupported by authority and had therefore been waived. *Id.*[4]

The court then turned to Petitioner's argument that Section 8 of the Compact waived immunity for his unpaid winnings claim. The court first determined that Petitioner's claims were barred unless the Pueblo had waived its immunity from suit in express and unequivocal terms. *Id.* at 8-9. The court then held, relying on the New Mexico Supreme Court's decision in *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, 141 N.M. 269, 154 P.3d 644 (2007) and the Court of Appeals' decisions in *R&R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, 139 N.M. 85, 128 P.3d 513 (2005), *cert. denied*, 2006-NMCERT-2002, 139 N.M. 339, 132 P.3d 596 (2006), and *Holguin v. Tsay Corporation*, 2009-NMCA-056, 146 N.M. 346, 210

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[4] This ruling contradicts Petitioner's assertion that immunity barred inquiry into the factual issues. Pet. 18. Petitioner's suggestion that his claim sounded in fraud, *id.*, is also incorrect. *See* Pet. App. 4.

P.3d 243 (2009), that the limited waiver of tribal immunity in Section 8 of the Compact for "bodily injury or property damage" applies only to claims of physical injury to persons or property, and that Petitioner's claims "cannot be so classified." Pet. App. 16.

REASONS FOR DENYING THE PETITION

I. THE COURT BELOW PROPERLY DECLINED TO LIMIT TRIBAL IMMUNITY IN TRIBAL GAMING CASES BEYOND THE LIMITATIONS IMPOSED BY CONGRESS IN THE INDIAN GAMING REGULATORY ACT

Petitioner contends that for various policy reasons, "it would be highly beneficial for this Court" to grant review and limit the application of tribal sovereign immunity in the tribal gaming context. Pet. 10. This argument fails for two reasons.

First, this Court reaffirmed in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), that it would defer to Congress to impose limits on tribal immunity, *id.* at 760, explaining that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" that proposals to limit tribal immunity present. *Id.* at 759. *See also Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991), in which the Court found that "Congress has consistently reiterated its approval of the immunity doctrine," reflecting its "desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development,'" (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)), and rejected an argument that tribal sove-

reign immunity should be "construe[d] more narrowly, or abandon[ed] entirely." 498 U.S. at 510.

Second, "Congress has acted against the background of [this Court's] decisions" by "restrict[ing] tribal immunity from suit in limited circumstances," including the limited waiver set forth in IGRA at 25 U.S.C. § 2710(d)(7)(A)(ii). *Kiowa*, 523 U.S. at 758. Thus, Congress has already determined the extent to which tribal immunity should be limited with respect to Indian gaming activities. The waiver which it enacted for that purpose, 25 U.S.C. § 2710(d)(7)(A)(ii), has no application here since this is not an action brought by a State to enjoin a class III gaming activity conducted in violation of a compact.

Finally, Petitioner's reliance on two decisions which do not address tribal sovereign immunity, *Nevada v. Hicks*, 533 U.S. 353 (2002)[5] and *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007),[6] as well as an article by an "ethnographer who studied the Seminole Indians in Florida," Pet. at 4-10, provides no basis for review of this case.

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[5] In *Hicks*, the Court decided only "the question of tribal-court jurisdiction over state officers enforcing state law" while "leav[ing] open the question of tribal court jurisdiction over nonmember defendants in general." 533 U.S. at 358 n.2.

[6] In *San Manuel*, the Court of Appeals for the District of Columbia Circuit held that the National Labor Relations Act could apply to a tribe's casino, but did not address the question of whether the "tribal government may be immune from suit." 475 F.3d at 1313 (citing *Kiowa Tribe*, 523 U.S. at 754).

II. PETITIONER'S ASSERTION THAT THE DECISION OF THE COURT BELOW INCORRECTLY CONSTRUED THE LIMITED WAIVER OF THE PUEBLO'S IMMUNITY IN ITS GAMING COMPACT WITH THE STATE TURNS ON NEW MEXICO LAW AND APPLIES ONLY TO GAMING COMPACTS IN NEW MEXICO.

Acting pursuant to IGRA, 25 U.S.C. § 2710(d)(1)(C), the Pueblo of Sandia and the State of New Mexico negotiated and entered into a Tribal-State gaming compact. Section 8 of this compact waives tribal immunity for claims by visitors who suffer "bodily injury or property damage" and provides for state court jurisdiction over such claims. Compact Sec. 8.A, 8.D; Pet. App. 23.[7] The Court of Appeals rejected Petitioner's argument that this language waived tribal immunity for his unpaid winnings claim, concluding that "Section 8 of the Compact provides a limited waiver of sovereign immunity for the claims of casino patrons that are based on physical injury to

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[7] Petitioner's argument for a waiver conflates a statement taken from Section 1.G of the Compact, which provides that its "Purpose and Objectives," include that "Gaming is conducted fairly and honestly," with language taken from Section 8.A of the Compact, which Petitioner selectively quotes, implying that the waiver of immunity in Section 8 encompasses the quoted language from Section 1.G of the Compact. Pet. 13. The full sentence in Section 8.A from which Petitioner quotes rejects this implication by limiting the purpose of Section 8 as follows: "[t]he safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the gaming conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation."

their persons or property. [Petitioner's] claims cannot be so classified." Pet. App. 16.

The Court of Appeals made clear that its ruling was based on prior decisions of the courts of the State of New Mexico. Pet. App. 11-16. These cases established that "[g]enerally 'Section 8 addresses subject matter jurisdiction over personal injury claims against the Pueblos resulting from incidents occurring on Indian land in connection with class III gaming,'" Pet. App. 11 (quoting *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, ¶ 8, 141 N.M. 269, 154 P.3d 644 (2007)), that the intent of Section 8 was to "'provide a limited waiver of sovereign immunity for purposes of providing a remedy to casino patrons who suffer *physical injury* to their persons or property,'" Pet. App 12 (quoting *R&R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 24, 139 N.M. 85, 128 P.3d 513 (2005) (emphasis added by the Court of Appeals in this case)), and that "the words 'bodily injury' and 'property damage' in Section 8 of the Compact relate to the safety of visitors and mean—as the plain meaning of the words imply—'physical damage to . . . persons or property.'" Pet. App. 13 (quoting *Holguin v. Tsay Corp.*, 2009-NMCA-056, ¶ 11, 146 N.M. 346, 210 P.3d 243 (2009)). The court went on to reject Petitioner's claim that his claim concerned property damage, holding that Section 8 waives immunity only for claims of "physical damage to Casino patrons or their property," and that "[t]he term physical injury or damage refers literally to the physical destruction or impairment of the tangible property of a casino patron." Pet. App. 15 (citing *Holguin*, 2009-NMCA-056, ¶ 13, 146 N.M. 346, 210 P.3d 243). Petitioner's disagreement with the decision of the court below, which relies on New Mexico

law and interprets compact provisions that apply only in New Mexico, furnishes no basis for review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 29, 2010